SUPREME COURT. U. S.

No. 856

JAN 24 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

EXCHANGE NATIONAL BANK OF CHICAGO, a national banking association

Petitioner,

vs.

HOMER A. BONHIVER, as Receiver of American Allied Insurance Company, and **SIDNEY P. ABRAMSON**

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

EDGAR BERNHARD
33 North La Salle Street
Chicago, Illinois 60602

LEONARD W. SIMONET
1200 First National Bank Building
Minneapolis, Minnesota 55402

HAROLD C. EVARTS
1200 First National Bank Building
Minneapolis, Minnesota 55402

MERRILL A. FREED
33 North La Salle Street
Chicago, Illinois 60602

Counsel for Petitioner

Of Counsel:

D'ANCONA, PFLAUM, WYATT & RISKIND
33 North La Salle Street
Chicago, Illinois 60602

BEST, FLANAGAN, LEWIS, SIMONET and BELLOWS
1200 First National Bank Building
Minneapolis, Minnesota 55402

McCORMICK & HENDERSON, INC., CHICAGO

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 856

EXCHANGE NATIONAL BANK OF CHICAGO, a national banking association

Petitioner,

vs.

HOMER A. BONHIVER, as Receiver of American Allied Insurance Company, and **SIDNEY P. ABRAMSON**

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Respondent's brief in opposition to the petition for certiorari is completely silent on the question presented by the petition, i. e., whether a District Court order which overrules a plea of venue privilege by a national bank is an appealable order under *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555 (1963).

We believe that respondent's silence is an eloquent argument in support of petitioner's position that the District

Court's order was appealable, that the appeal should not have been dismissed by the Court of Appeals, and that certiorari should be granted and the cause remanded to the Court of Appeals in order that the merits of petitioner's venue plea may be adjudicated.

Respondent's brief is devoted solely to the contention that petitioner's appeal was not timely. The statement of the case in our petition (pages 4-6) contains the relevant dates, and we submit that the following summary of those dates thoroughly demolishes any suggestion that the appeal was not timely:

August 20, 1968—Order of District Court overruling venue plea of petitioner.

August 27, 1968—Motion of petitioner to amend order of August 20 to include findings under 28 U.S.C. 1292 (b).

Elapsed time—seven days from entry of the order overruling the venue plea.

September 24, 1968—Order denying petitioner's motion to amend August 20 order.

September 26, 1968—Entry of order of September 24.

October 2, 1968—Notice of appeal given by petitioner.

Elapsed time—eight days from date of order (and only six days from the date of entry of the order) denying the motion to amend.

Respondent contends that, despite petitioner's determined and diligent effort to assert its venue plea, petitioner has somehow allowed more than 30 days to run.

However, as shown by the foregoing chronology, the longest period that petitioner allowed to elapse was eight days.

Rule 4 of the Federal Rules of Appellate Procedure (referred to in our petition at page 6) provides that the time for appeal is stayed by a timely motion to alter or amend a judgment under Rule 59 (e) of the Federal Rules of Civil Procedure.

Respondent suggests that a motion to alter or amend a judgment under Rule 59 (e) applies only to "a judgment after trial." (Respondent's brief page 6.) But Rule 59 (e) does not contain the words "after trial", nor does respondent cite any authority to support his attempted amendment of the Federal Rules.

Moreover, the Federal Rules themselves contain the answer to respondent's argument. Rule 54 (a) provides as follows:

> "(a) *Definition; Form.* 'Judgment' as used in these rules includes a decree and *any order from which an appeal lies.* A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings." (Emphasis added.)

It follows, therefore, that the single question presented by this petition for certiorari is, as stated in the original petition: whether an order overruling a national bank's venue privilege is appealable under *Langdeau.* If such an order is appealable, then the August 20 order (overruling petitioner's venue plea) was a judgment as defined by Rule 54 (a), petitioner's August 27 motion was a motion to alter or amend a judgment under Rule 59 (e), and petitioner's time to appeal did not begin to run until the denial of that motion by order entered September 26, 1968.

Notice of appeal having been given on October 2, 1968, the appeal was timely under Rule 4 of the Federal Rules of Appellate Procedure.

Respondent's brief, by raising the false issue of timeliness, attempts to avoid the merits of the venue question and to escape from the binding authority of this Court's opinion in *Langdeau*.

We ask that the petition for certiorari be granted.

Respectfully submitted,

EDGAR BERNHARD
33 North La Salle Street
Chicago, Illinois 60602

LEONARD W. SIMONET
1200 First National Bank Building
Minneapolis, Minnesota 55402

HAROLD C. EVARTS
1200 First National Bank Building
Minneapolis, Minnesota 55402

MERRILL A. FREED
33 North La Salle Street
Chicago, Illinois 60602
Counsel for Petitioner

Of Counsel:
D'ANCONA, PFLAUM, WYATT & RISKIND
33 North La Salle Street
Chicago, Illinois 60602

BEST, FLANAGAN, LEWIS, SIMONET and BELLOWS
1200 First National Bank Building
Minneapolis, Minnesota 55402